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### Toward a Canadian Right to Repair: Opportunities and Challenges

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# TOWARD A CANADIAN RIGHT TO REPAIR: OPPORTUNITIES AND CHALLENGES

*Anthony D. Rosborough<sup>†</sup>*

## ABSTRACT

This Article draws a picture of the past, present, and future of the right to repair in Canada. It looks to early successes toward automotive right to repair, challenges faced in proposing consumer protection reforms in Ontario and Quebec, and the utility of a proposed copyright “Technological Protection Measure (TPM) exception” allowing circumvention for repair purposes. In light of right to repair priorities identified by Canada’s current federal government, the Article identifies a selection of reforms that could achieve these goals. Such reforms include creating regulations under the *Copyright Act* governing the use and implementation of TPMs, passing an exception to the *Trademarks Act* to facilitate the importation of replacement parts, and expanding access to remedies under the *Competition Act*. The creation of a federal sustainability index with repairability scores is also addressed. The Article then looks to potential obstacles and challenges in realizing upon right to repair reforms in Canada, including constitutional restrictions on Parliament’s legislative power and the need to find grassroots support for the right to repair as a social movement. Looking to the future of the right to repair in Canada, the Article contends that a greater degree of federal-provincial cooperation is needed to address the multifaceted and interwoven laws which touch upon repair.

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## I. INTRODUCTION

Throughout the 1990s, *The Red Green Show* was a staple of Canadian comedy television. Both loathed and loved by viewers across the country, the show's sketches centered around Red Green, a simple man who assailed the status quo. Red was emblematic of the Canadian rural every-person who, with self-deprecating humor and honesty, fashioned wholly inadequate and comedic solutions to common repairs and household projects. During segments titled "Handyman Corner" and "If It Ain't Broke, You're Not Trying," Red perilously attempted to repair things such as a cracked car windshield using a hammer and nail, only exacerbating the problem, and retrofitted common household appliances for various purposes. Virtually all of Red's repairs and projects involved duct tape, his "secret weapon."

*The Red Green Show* strongly featured self-repair and DIY activities partly because of their resonance with Canadian culture and folklore in a broader sense. Despite Canada's increasingly urbanized population,<sup>1</sup> much of its culture stems not from the urbanite vicissitudes or trends within city centers, but instead stories of the rural vernacular and small-town self-reliance. Repair and frugal ingenuity are ubiquitous themes throughout the cultural works of Canadiana, including the community-building aspects of repair in CBC's *Corner Gas*, the moral ambiguity in refurbishing and selling abandoned shopping carts in *Trailer Park Boys*, and the heroic marine salvage efforts depicted in the late Stan Rogers' folk song "The Mary Ellen Carter." Overall, the great expanse of

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1. According to a World Bank study, 81.56% of the total population of Canada lives in cities as of 2020. See Aaron O'Neill, *Urbanization in Canada 2020*, STATISTA.COM (Jan. 11, 2022), <https://www.statista.com/statistics/271208/urbanization-in-canada/>.

Canada's landscape and the frequent harsh winters make repair and maintenance prominent fixtures in Canadian life.

But unlike the wooden ships, cars, appliances, and devices of decades past, the repair work of today requires more than duct tape, a cavalier attitude, or commonly available tools. The culmination of embedded computer systems, onerous warranties and terms of use, intellectual property protections, and restrictive design techniques have made the repair of common devices increasingly out of reach for most people.<sup>2</sup> In response, Canada's right to repair movement has gradually assembled a coalition of consumer rights advocates, environmental groups, community repair enthusiasts, and scholars to propose a series of legal reforms to resolve the legal and market tools used by manufacturers to create these restrictions.<sup>3</sup> Taking influence from both the United States and the European Union, Canada has begun to focus its attention on enacting its own set of right to repair reforms. Though Canadian public opinion on the right to repair provides reason to be optimistic in these efforts,<sup>4</sup> the complexity of Canada's federal system and the power wielded by special interests have revealed underlying challenges. Nevertheless, for reasons of supporting market competitiveness, reducing waste, and increasing consumer choice, Canada's current government has made enacting the right to repair a key policy priority.<sup>5</sup>

So far, efforts toward enshrining the right to repair into law have fallen short of comprehensive. To date, private members' bills at the federal and provincial levels have sought only isolated reforms with varying success. In the absence of a regulatory scheme devised through federal-provincial cooperation, individual policymakers have instead pursued piecemeal amendments to existing provincial and federal statutes. The lack of concerted government action can be partially attributed to the relative complexity and legislative overlap of Canada's many laws touching upon repair, conceptual ambiguity as to precisely which legal reforms are needed to enable such a right, and the constitutional division of federal and provincial legislative powers. As

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2. For a comprehensive overview of the many ways in which manufacturers have discouraged and prevented repair, see generally AARON PERZANOWSKI, *THE RIGHT TO REPAIR* 72–109 (2002).

3. See THE CANADIAN REPAIR COALITION, <http://www.canrepair.ca/about-us/> (last visited Feb. 16, 2023).

4. OpenMedia and iFixit generated a poll in 2019 to measure Canadians' opinion on the right to repair. 75% of Canadians support right to repair legislation, and 76% of people have discarded an electronic device prematurely because repairing it was too expensive. See *Poll: 75% of People in Canada Support Right to Repair Legislation*, OPENMEDIA (June 12, 2019), <https://openmedia.org/press/item/poll-75-people-canada-support-right-repair-legislation/>.

5. *A Right to Repair Your Home Appliances*, LIBERAL PARTY CAN., <https://liberal.ca/our-platform/a-right-to-repair-your-home-appliances/> (last visited May 14, 2022).

a result, there is a need to survey Canada's efforts toward the right to repair and to transpose the normative ideals of the movement into concrete proposals for future legislative reforms.

This Article seeks to hit on precisely those two points. It surveys the progress to date on right to repair reforms in Canada, and then identifies some potential opportunities for further legislative reform. It also highlights some potential constitutional obstacles and normative challenges in moving the right to repair movement forward in the Great White North. Part II begins with a survey of right to repair reforms in Canada to date. It looks to some early successes toward automotive right to repair, proposed consumer protection reforms in Ontario and Quebec, and a proposed "Technical Protection Measure (TPM) Exception" allowing circumvention for repair purposes. Part III canvasses a selection of federal reforms that could further enable the right to repair. These include creating regulations governing the use and implementation of TPMs, passing an exception to the *Trademarks Act* to facilitate the importation of replacement parts, and expanding access to remedies under the *Competition Act*. The creation of a federal sustainability index with repairability scores is also addressed. Finally, Part IV assesses some potential obstacles to enacting right to repair legislation at the federal level, including constitutional restrictions on Parliament's legislative power and the need to find grassroots resonance with the right to repair as a social movement.

This Article is not intended to provide a comprehensive or exhaustive list of potential reforms to enable the right to repair in Canada. Rather, the intent is to survey a handful of potential reforms that may encourage discussion among policymakers and right to repair advocates in Canada. To this end, its analysis focuses primarily on the opportunities for *federal* legislation supporting the right to repair. Further legal research and analysis of potential provincial reforms is needed, particularly in relation to addressing restrictive terms of use and product warranties discouraging repair. The Article's overall contention is that federal-provincial cooperation is essential for the success of the right to repair in Canada.

## II. THE CURRENT STATE OF REPAIR IN CANADA

To date, proposals for right to repair legislation in Canada have moved forward in three broad domains. The first is long line of federal competition law reform proposals aimed at providing access to parts, tools, and information for independent repairers in the automotive industry. The second takes shape around amending provincial consumer protection acts—notably those in Ontario and Quebec. The third is a focus on expanding the permitted

exceptions to Canada's anti-circumvention laws under the *Copyright Act* for the purposes of repair. Each of these areas is discussed in greater detail below.

#### A. AUTOMOTIVE RIGHT TO REPAIR

Canada is one of the first jurisdictions globally to consider legislation with an explicit automotive right to repair focus. The first such proposal came in 2007 in the form of MP Brian Masse's private members' Bill C-425.<sup>6</sup> Following a federal election in 2008, the bill was reintroduced in 2009 as Bill C-273.<sup>7</sup> It sought to amend Canada's *Environmental Protection Act*<sup>8</sup> and *Competition Act*<sup>9</sup> to provide independent automobile technicians with the same diagnostic information and tools made available to manufacturers and franchised dealers.

Though the bill received considerable support and debate during its first and second readings in Parliament,<sup>10</sup> concerns were raised to the Minister of Industry regarding whether the Canadian Competition Tribunal could compel auto manufacturers to provide tools and information protected by intellectual property rights.<sup>11</sup> This ambiguity coupled with the potential to inadvertently cause negative impacts in other industries was reason enough for the Minister of Industry to explore alternatives to legislation. The solution settled upon was a voluntary agreement between automotive manufacturers and aftermarket industry groups in September of 2009, the Canadian Automotive Service Information Standard (CASIS).<sup>12</sup> As the result of CASIS' conclusion, Bill C-273 was abandoned.

The CASIS agreement includes some notable right to repair wins, with corresponding concessions. As far as wins are concerned, CASIS guarantees independent technicians access to the tools, training, and information necessary for automotive diagnosis and repair. As for the concessions,

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6. An Act to amend the Competition Act and the Canadian Environmental Protection Act, 1999 (right to repair) 2007, HC Bill [C-425] (Can.) <https://www.parl.ca/legisinfo/en/bill/39-1/c-425/>.

7. An Act to amend the Competition Act and the Canadian Environmental Protection Act, 1999 (right to repair) 2009, HC Bill [C-273] (Can.) <https://www.parl.ca/legisinfo/en/bill/40-2/c-273/> [hereinafter Bill C-273].

8. Environmental Protection Act, 1999, S.C. 1999, c 33 (Can.).

9. Competition Act, R.S.C. 1985, c C-34 (Can.).

10. Bill C-273.

11. Kelly Moffatt & Meredith Ashton, *Voluntary agreement a viable alternative to Bill C-273 (right to repair)*, LEXOLOGY (Dec. 31, 2009), <https://www.lexology.com/library/detail.aspx?g=0a20f656-2e82-4458-8d41-f417b2f750c9/>; see, e.g., HC Deb (11 May 2009) (144 col. 1105, <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-55/hansard>).

12. An Agreement Respecting The Canadian Automotive Service Information Standards (Sept. 29, 2009) (CASIS), [http://www.cvma.ca/wp-content/uploads/2017/03/Canadian\\_Automotive\\_Service\\_Information\\_Standard\\_Sep\\_2009.pdf](http://www.cvma.ca/wp-content/uploads/2017/03/Canadian_Automotive_Service_Information_Standard_Sep_2009.pdf).

however, CASIS includes an acknowledgement that the tools, diagnostics information, and training materials remain the “exclusive property” of manufacturers.<sup>13</sup> The result is that some tools and information that may not otherwise be protectable subject matter under intellectual property laws can be given the same level of exclusivity through contract.

More than ten years after the CASIS agreement was concluded, MP Brian Masse once again introduced a private members’ bill that expands upon the obligations of manufacturers.<sup>14</sup> Beyond contractual guarantees for parts and tools through CASIS, Bill C-231 proposes to compel access to software and empower the Canadian Competition Tribunal to make orders for compliance. Manufacturers are obligated to provide independent repairers with “technical updates, diagnostic software or tools and any related information.”<sup>15</sup> With the rise and prominence of electronic vehicles (EVs), and the growing importance of onboard software for the diagnosis and repair of cars, Bill C-231 is seen as a necessary update to the CASIS agreement. Bill C-231 has completed its first reading but will only receive scrutiny from parliamentarians upon its second reading, the date for which is still to be determined. Given that intellectual property concerns in relation to tools and information led to Masse’s Bill C-273 being abandoned back in 2009, it is reasonable to speculate that similar concerns will arise as Bill C-231 moves ahead.

Though far from addressing all the impediments to repair in the automotive context, Canada has shown a relatively long and concerted effort toward securing an automotive right to repair. Over the course of several decades, the effort has resulted in concrete and meaningful repairability assurances through the CASIS agreement. Proposed legislative reforms have also drawn attention to the importance of repairability for aftermarket competition in a broader sense.

## B. PROVINCIAL CONSUMER PROTECTION REFORMS

Two of Canada’s most populous provinces, Ontario and Quebec, saw the introduction of right to repair bills amending their consumer protection acts in 2019. Then-Ontario opposition MPP Michael Coteau introduced the first of these efforts with Bill 72.<sup>16</sup> The bill was inspired by Coteau’s own strife with

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13. *Id.* § III(1)(b) at 8.

14. An Act to amend the Competition Act (vehicle repair) 2022, HC Bill [C-231] (Can.), <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-231/first-reading/> (last visited Feb. 16, 2023).

15. *Id.* § 75.1(1)(a), at 1.

16. An Act to amend the Consumer Protection Act, 2002 respecting the repair of electronic products 2019, Legis. Assemb. Ont. Bill [72] (Can.), <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-72/> [hereinafter Bill 72].

a broken smartphone screen and his inability to have it repaired at a reasonable cost.<sup>17</sup> To these ends, Bill 72 addressed “electronic products,” defined as tangible goods that “work at least in part because of electronics that are part of them or attached to them.”<sup>18</sup> It proposed to amend Ontario’s *Consumer Protection Act*<sup>19</sup> by requiring the provision of parts, tools, and information by “brand holders” – a concept intended to be more effective than applying to manufacturers who may not have a presence in Canada.

The bill mandated brand holders to provide documentation, replacement parts, software and other tools used for diagnosis, maintenance, or repair at “request of a consumer or consumer electronics repair business.”<sup>20</sup> Beyond these core obligations, Bill 72 set limits on what brand holders may charge for documentation, parts, software, and tools.<sup>21</sup> For example, electronic copies of documentation must be provided at no cost, while parts, software, and tools must be provided to consumers and independent repairers without price discrimination.<sup>22</sup> On this latter point, the bill was ahead of its time. As recent gripes over Apple’s self-repair program demonstrate,<sup>23</sup> enforcing price restrictions on parts, tools, and information can go a long way in making repairs more feasible for consumers.

As one might expect, the introduction of Bill 72 resulted in a significant amount of attention and resistance from industry groups, the Ontario Chamber of Commerce (OCC), and manufacturers.<sup>24</sup> These groups spent considerable energy persuading Ontario’s MPPs that Bill 72 would not be in the best interests of the province.<sup>25</sup> Some of the reasons cited were poorly argued, including the OCC’s assertion that the bill would make it easier for criminals to carry out cyberattacks. Coteau also received attention and was approached directly by the Electronics Product Stewardship Canada, an industry group that represents companies like Apple and Panasonic, to

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17. Online Interview with Michael Coteau, Member of Parliament, (Apr. 12, 2022).

18. Bill 72, § 54.1.

19. Consumer Protection Act, 2002, S.O. 2002, c 30 (Ontario) [hereinafter *Consumer Protection Act*].

20. Bill 72, § 52.2(1).

21. See, e.g., Bill 72, § 54.2(3) (limiting the amounts brand holders may charge for copies of repair manuals and related information).

22. See, e.g., Bill 72, § 54.2(3) (placing the “fair price” limitations on parts, software, and tools).

23. See Brian X. Chen, *I Tried Apple’s Self-Repair Program With My iPhone. Disaster Ensued.*, NEW YORK TIMES. (May 25, 2022), <https://www.nytimes.com/2022/05/25/technology/personaltech/apple-repair-program-iphone.html/>.

24. Interview with Coteau, *supra* note 17.

25. Interview with Coteau, *supra* note 17.



reconsider the bill altogether.<sup>26</sup> In a brazen move by Apple, Coteau was even personally visited by corporate representatives who offered to replace his broken phone for no charge.<sup>27</sup>

Though Coteau remained steadfast in his support for the bill, the lobbying efforts and other tactics were ultimately successful in Ontario.<sup>28</sup> They cumulatively crafted a narrative that Bill 72 would harm competitiveness and consumer choice in Ontario, imperil the intellectual property rights of manufacturers, and pose hazards to user safety. During debate over the bill in May of 2019, Government MPP Stephen Crawford remarked that the bill would “mean that companies would choose not to sell their products in this province,” and that the intellectual property concerns would open small business owners and consumers to “legal action by the original manufacturer of their device.”<sup>29</sup> Despite the bill’s widespread support from consumer rights and environmental groups, Mr. Crawford’s more critical view of the bill represented that of government MPPs, leading to the bill being lost on second reading.<sup>30</sup>

Though ultimately unsuccessful, Ontario’s Bill 72 stands out as the most direct and poignant proposal to legislate the right to repair in Canada to date. By applying to the broad category of “electronic products,” the bill would have had sweeping implications for a whole host of consumer devices. Given that Ontario is Canada’s most populous province, the success of Bill 72 would have undoubtedly inspired similar efforts across the country.

However, lessons can be learned from the bill’s failure. For one, its breadth may have formed part of the reason for trepidation among Ontario’s provincial policymakers at the time it was being considered. The repeated references to intellectual property concerns throughout Bill 72’s debates also suggests that policymakers may be hesitant to impose right to repair obligations on manufacturers, which may conflict with the *Copyright Act* and other federal intellectual property statutes. Finally, the failure of Bill 72 suggests that right to repair bills in Canada are not above age-old party politics. As an opposition

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26. Jordan Pearson, *Right to Repair Killed After Big Tech Lobbying In Ontario*, MOTHERBOARD (May 2, 2019), <https://www.vice.com/en/article/9kxayy/right-to-repair-bill-killed-after-big-tech-lobbying-in-ontario/>.

27. Interview with Coteau, *supra* note 17.

28. These were discussed in the Vice article, and in particular, showed a comparison between Apple’s “safety” narrative and that later articulated by the Ontario Chamber of Commerce in the Consumer Protection Act.

29. Legis. Assemb. Ont. (2 May 2019), No. 100 col. 1420 (Can.), [https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2019/2019-07/02-MAY-2019\\_L100.pdf](https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2019/2019-07/02-MAY-2019_L100.pdf).

30. *Id.* at 1420–40.

MPP at the time, Coteau's bill was regarded by at least some government MPPs as "trying to show the government doesn't care about consumers."<sup>31</sup> Conjecture of this sort reveals that, private members' bills introduced by opposition members may be judged more from the position of partisanship than on their merits.

Only a few months after Bill 72 was introduced in Ontario, another right to repair private members' bill was introduced in the National Assembly of Quebec.<sup>32</sup> Bill 197 was introduced by the MNA for Chomedey, Mr. Guy Ouellette and drafted in conjunction with law students from the University of Sherbrooke.<sup>33</sup> With the title, "An Act to amend the Consumer Protection Act to fight planned obsolescence and assert the right to repair goods," the bill adopts a somewhat different approach from Ontario's Bill 72.<sup>34</sup> In some respects, the Quebec bill is narrower by mandating the provision of parts, tools, and repair at reasonable prices only for goods that are "the object of a contract."<sup>35</sup> Ostensibly, this means goods for which there is a warranty relationship between the consumer and its manufacturer. On the other hand, Quebec's Bill 197 envisions a much broader set of reforms when compared to Ontario's Bill 72. In addition to a general obligation to provide parts, tools, and information for warranted goods, the bill establishes a sustainability rating and product labelling system for household appliances.<sup>36</sup> It also tasks the Bureau de normalisation du Québec (BNQ), a standards body, with establishing this rating system after studying various products and devices.<sup>37</sup>

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31. *Id.*

32. An Act to amend the Consumer Protection Act to fight planned obsolescence and assert the right to repair goods 2019, Nat'l Assemb. Que. Bill [197] (Can.), <http://m.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-197-42-1.html>.

33. Independent Members, *Bill 197 against planned obsolescence and the right to repair—M.N.A. Guy Ouellette presents innovative bill to control planned obsolescence and the right to compensation*, GOV'T QUÉBEC (Apr. 10, 2019, 1:37 PM), <https://www.quebec.ca/en/news/actualites/detail/bill-197-against-planned-obsolescence-and-the-right-to-repair-mna-guy-ouellette-presents-innovative-bill-to-control-planned-obsolescence-and-the-right-to-compensation>.

34. Bill 197.

35. In its *Summary on the brief presented to the Office of Consumer Protection on the durability and repairability of goods*, Canada's Competition Bureau recommended expanding the scope of Quebec's Bill 197 beyond those covered by a contract, stating that "[t]he Bureau encourages the Office's proposal to expand the availability guarantee to include goods other than those covered by a contract under section 39 CPA", recognizing that "...the definition of goods covered by the guarantee should take into account the increasing complexity of consumer goods and should be able to be adapted to future technological developments." See SUMMARY OF THE BRIEF PRESENTED TO THE OFFICE OF CONSUMER PROTECTION ON THE DURABILITY AND REPAIRABILITY OF GOODS, COMPETITION BUREAU CAN. (Jan. 20, 2022), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04534.html>.

36. Bill 197, § 13.

37. Bill 197, § 12.

The Quebec bill takes a more punitive approach than Ontario's Bill 72. It prevents merchants and manufacturers from terminating product warranties as the result of independent repair.<sup>38</sup> Drawing influence from a 2014 French governmental Decree no. 2014-1482,<sup>39</sup> the Quebec bill also creates a new regulatory offence of "planned obsolescence" with a minimum fine of \$10,000.<sup>40</sup> It defines planned obsolescence as a "set of techniques for reducing the mean time to first failure of goods destined for sale or for lease."<sup>41</sup> Finally, the Quebec bill tasks the Minister of Consumer Protection with preparing a report every three years on the efficacy of consumer protection laws and advice for further amendments.<sup>42</sup>

The Quebec bill received unanimous and multi-partisan support in the Quebec National Assembly in April of 2021,<sup>43</sup> leading to its adoption in principle. It has since been relegated to a type of legislative purgatory, however, awaiting further study from a National Assembly committee.<sup>44</sup> In response, MNA Guy Oulette has commented that there may be a lack of "serious desire to tackle" repairability and sustainability issues in Quebec.<sup>45</sup>

Perhaps one reason for the slow progress is the multifaceted structure of the bill and what it aims to achieve. For example, defining the type of conduct that may constitute "planned obsolescence" may be tricky in practice, as deliberately shortening the lifespan of products can be indistinguishable from simply poor design or construction.<sup>46</sup> Moreover, the bill's proposal to task a standards organization with establishing a sustainability rating system could be an enormous undertaking if it means starting from scratch. With similar rating systems being incorporated elsewhere,<sup>47</sup> it is likely that Quebec would draw

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38. Bill 197, § 5.

39. Loi 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte [Law 2015-992 of August 17, 2015 on Energy Transition for Green Growth (Energy Transition Law)], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 18, 2015, p. 1426, No. 1.

40. Bill 197, § 10.

41. Bill 197, § 1(1)(k.1).

42. Bill 197, § 14.

43. Bill 197.

44. Steve Rukavina, *Quebec environmental watchdog urges province to adopt 'right to repair' law*, CBC News (Jan. 26, 2022), <https://www.cbc.ca/news/canada/montreal/quebec-right-to-repair-proposal-1.6328159/>.

45. *Id.*

46. See Eleonore Maitre-Ekern & Carl Dalhammar, *Regulating Planned Obsolescence: A Review of Legal Approaches to Increase Product Durability and Repairability in Europe* 25 REV. EUR. COMP. INT. ENVIRON. L. 3, 387–88 (2016).

47. See, e.g., *Repairability Index*, MINISTRY ECOLOGICAL TRANSITION & TERRITORIAL COHESION & MINISTRY ENERGY TRANSITION (FR.) (July 26, 2022), <https://www.ecologie.gouv.fr/indice-reparabilite/>.

strong influence from established indices. But even a *carte blanche* adoption of existing repairability rating systems could be a significant undertaking for the province. Finally, the intellectual property concerns that featured prominently in the Ontario debates remain unaddressed in relation to the Quebec bill.

Being a first mover also has its disadvantages. As will be discussed further in Part IV, the establishment of a provincial sustainability or repairability rating system may paradoxically complicate efforts toward a Canada-wide system at the federal level. Though Quebec consumer laws have generally taken a more interventionist approach than the common law provinces in Canada,<sup>48</sup> imposing new positive obligations on manufacturers specific to one province may also limit consumer choice in Quebec while provoking lobbying responses from industry groups similar to those seen in Ontario. What both the Ontario and Quebec examples demonstrate, however, is that assurances are needed at the federal level through amendments to Canada's intellectual property statutes.

### C. ANTI-CIRCUMVENTION REFORMS

Canada incorporated anti-circumvention provisions into its *Copyright Act* as part of the 2012 *Copyright Modernization Act*.<sup>49</sup> Its approach to TPMs is more restrictive than the requirements as set out in the WIPO World Copyright Treaty, adopting the more far-reaching "access control" concept originating from the United States' *Digital Millennium Copyright Act*.<sup>50</sup> The incorporation of access control TPMs into Canadian law has been met with enormous criticism and concern among scholars<sup>51</sup> and public interest groups<sup>52</sup> over the past decade. These concerns have centered around the negative impacts on the fair dealing, imperilment of the public domain,<sup>53</sup> harms to competitive

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48. For a discussion on the history and rationale of consumer protection laws in Quebec, see Chana Shulamit Edelstein, *Missed Opportunity: A Critique of the Supreme Court of Canada's Characterization of Quebec Consumer Protection Law in Marcotte* (Aug. 2016) (L.L.M. thesis, McGill University), <https://escholarship.mcgill.ca/concern/theses/bv73c321g>.

49. S.C. 2012, c 20, §§ 47–48 (Can.).

50. 17 U.S.C. § 1201.

51. See Ian Kerr, *Digital Locks and the Automation of Virtue*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA (Michael Geist ed., 2010); see also Carys Craig, *Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of "Prescriptive Parallelism"*, 13 J. WORLD INTELL. PROP. 4, 503–39 (2010).

52. See Christine Dobby, *Canada's copyright overhaul and the digital locks controversy*, FIN. POST (Sept. 29, 2011), <https://financialpost.com/technology/canadas-copyright-conundrum-and-the-digital-locks-controversy/>.

53. See Pascale Chapdelaine, *Digital Locks, Physical Objects and Immaterial Works*, in COPYRIGHT USER RIGHTS: CONTRACTS AND THE EROSION OF PROPERTY, 129–50 (2016).

innovation,<sup>54</sup> and the moral implications of limiting user choice.<sup>55</sup> In many respects, these concerns mirror the longstanding critiques of anti-circumvention laws formulated by scholars and experts in the United States.<sup>56</sup>

Following the heavy-handed decision of Canada's Federal Court in *Nintendo of America, Inc. v. King*, awarding damages of over \$22 million for the installation of mod chips in game consoles,<sup>57</sup> federal policymakers began to look more seriously at the potential public interest costs of anti-circumvention laws. In its 2019 *Statutory Review of the Copyright Act*, the House of Commons' Standing Committee on Industry, Science and Technology (the INDU Committee) produced a report which included an analysis of Canada's anti-circumvention laws and proposed to "modernize copyright policy" to permit repair and other non-infringing activities.<sup>58</sup> The INDU Committee recommended that the Government of Canada:

examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes.

In 2021, the Government of Canada partially took up that task in "A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things,"<sup>59</sup> a report prepared by Industry, Science and Economic Development Canada. The Consultation surveyed the ways that TPMs can negatively impact repair activities, called for further evidence from

54. Anthony D. Rosborough, *If a Machine Could Talk, We Would Not Understand It: Canadian Innovation and the Copyright Act's TPM Interoperability Framework*, 19 J.L. & TECH. 141–71 (2021).

55. See Kerr, *supra* note 44.

56. See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of Their Use of Technical Protection Measures?*, 6 J. ON TELECOMM. & HIGH TECH. L. 41 (2007); Andrew Adams & Ian Brown, *Keep Looking: The Answer to the Machine is Elsewhere*, 19 COMPUT. & L. 6, 32–35 (2009); and Dan Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003).

57. 2017 FC 246.

58. STANDING COMM. ON INDUSTRY, SCI. & TECH., HOUSE OF COMMONS, STATUTORY REVIEW OF THE COPYRIGHT ACT (June 2019), <https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf> [hereinafter STANDING COMM. ON INDUSTRY, SCI. & TECH. REVIEW].

59. INNOVATION, SCI. & ECON. DEV. CAN., A CONSULTATION ON A MODERN COPYRIGHT FRAMEWORK FOR ARTIFICIAL INTELLIGENCE AND THE INTERNET OF THINGS (2021), <https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/ConsultationPaperAIEN.pdf>.

stakeholders, and identified two ways forward in terms of legislative reform.<sup>60</sup> The first approach is to introduce a targeted exception permitting circumvention of TPMs for repair purposes.<sup>61</sup> The alternative approach is to establish a periodic review process analogous to the United States' Librarian of Congress' § 1201 rulings under the DMCA.<sup>62</sup>

For now, the first approach seems to be preferred. In February of 2021, Liberal MP Bryan May introduced Bill C-272 in Canada's Parliament.<sup>63</sup> It creates a new exception permitting circumvention of TPMs, which protect access to computer programs where the "sole purpose" is "diagnosing, maintaining, or repairing a product in which the computer program is embedded."<sup>64</sup> Bill C-272 received unanimous and multi-partisan support in Canada's parliament at both its first and second readings.<sup>65</sup> On June 2, 2021, it was referred to committee for further review.<sup>66</sup> As the result of the federal election held during the autumn of 2021, however, Bill C-272 died on the Order Paper.<sup>67</sup> This necessitated the bill's reintroduction as C-244 in February of 2022,<sup>68</sup> and an effective reset of the legislative process and timeline. Though some concerns were raised during debate about the bill's breadth and potential ambiguities, the consensus among parliamentarians is that these considerations should form part of a parliamentary committee's "clause by clause" review.<sup>69</sup>

The TPM Repair Exception proposed by Bill C-244 would go a long way in alleviating the concerns of independent repairers and provincial policymakers in enacting consumer protection reforms. Nevertheless, there are

60. STANDING COMM. ON INDUSTRY, SCI. & TECH. REVIEW at 72.

61. STANDING COMM. ON INDUSTRY, SCI. & TECH. REVIEW at 22.

62. 17 U.S.C. §§ 1201(a)(1)(B)–(D) (2000).

63. An Act to amend the Copyright Act (diagnosis, maintenance or repair) 2021, HC Bill [C-272] (Can.), <https://www.parl.ca/DocumentViewer/en/43-2/bill/C-272/first-reading/>.

64. *Id.* at § 41.121(1).

65. See HC Deb (22 Feb. 2021) (150) col. 1635 (Can.), <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-63/hansard>; HC Deb (2 June 2021) (150) col. 1600 (Can.) <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-109/hansard>.

66. See HC Deb (22 Feb. 2021) (150) col. 1635 (Can.), <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-63/hansard>; HC Deb (2 June 2021) (150) col. 1600 (Can.) <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-109/hansard>.

67. When an election is called in the British parliamentary system, pending bills die with the dissolution of that parliament and session. They need to be later reintroduced as new bills once the election is over and parliament has resumed its next sitting with a newly elected government.

68. HC Deb (8 Feb. 2022) (151) col. 1010 (Can.), <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-26/hansard>.

69. HC Deb (15 Apr. 2021) (150) col. 1850 (Can.), <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-81/hansard#11239225>.

drawbacks in pushing forward with this approach. By permitting circumvention for the sole purpose of “diagnosing, maintaining, or repairing” devices, much would hinge on the nature of the activity in question. It is foreseeable that at least some activities within the realm of repair would be argued by manufacturers as being outside the scope of the new exception. For example, a device may not be repairable in a restorative sense but instead require a more innovative solution to continue working – a custom part, modification to onboard software, or removal of certain components. Likewise, users may wish to circumvent TPMs to restore features that have been removed<sup>70</sup> by manufacturers through software updates and converted to paid add-ons.<sup>71</sup> In such instances, it is not clear that circumventing a TPM would fall within the ambit of diagnosis, maintenance, or repair – even if the intent is to make the device work as expected or originally configured.

By placing the emphasis on the purposes for circumvention rather than the TPM’s relationship to copyright, the proposed TPM Repair Exception risks adopting an overly static approach to TPMs. As we have seen over the past two decades, today’s plethora of Internet of Things (IoT) and software embedded devices, products, and machinery increasingly resemble services as opposed to products.<sup>72</sup> TPMs play a significant role in providing manufacturers with the means to continually alter the terms of how devices are used and the types of functions they are willing to perform. In effect, the ability of manufacturers to remotely adjust device functionality may also allow them to indirectly determine which activities constitute “diagnosis, maintenance, or repair.” While the TPM Repair Exception proposed through Bill C-244 is promising, it is likely that a more responsive and malleable approach to TPM regulation in Canada is needed in the long run.

Despite some drawbacks in its proposed implementation, the multi-partisan and unanimous support among parliamentarians for the TPM Repair Exception reveals that right to repair legislation resonates with Canadian policymakers. It also demonstrates willingness on behalf of parliamentarians to take on intellectual property reforms to facilitate broader right to repair legislation. And given the reluctance of Canada’s provinces to enact right to repair legislation that may interfere with IP, federal responsiveness and appetite for reform is crucial. Though far from comprehensive, the TPM

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70. Samuelson & Schultz, *supra* note 56, at 57–58.

71. See, e.g., How some treadmill owners have hacked its onboard software to restore features originally offered for free: Matt Burgess, *Locked out of “God mode,” runners are hacking their treadmills*, ARSTECHNICA (Nov. 20, 2021), <https://arstechnica.com/information-technology/2021/11/locked-out-of-god-mode-runners-are-hacking-their-treadmills/>.

72. See, e.g., Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783 (2019).

Repair Exception shows promise in offering the provinces some of the assurances they need to push ahead with right to repair reforms at the consumer protection level.

#### D. THE RIGHT TO REPAIR AS A FEDERAL PRIORITY

In addition to receiving the general support of parliamentarians, Canada's executive branch has also signaled that the right to repair is a key policy priority moving forward. Following the Liberal Party of Canada's success in the 2021 federal election, the Prime Minister's Office issued ministerial mandate letters calling upon certain ministers to engage in collaboration and policy development toward the right to repair. In these letters, the Prime Minister requested that the Minister of Environment and Climate Change "[w]ork with the Minister of Innovation, Science and Industry to implement a 'right to repair' to extend the life of home appliances, particularly electronics, and require businesses to inform Canadians of the environmental impacts of consumer products."<sup>73</sup> The Prime Minister also requested that the Minister of Industry, Science and Industry "requir[e] manufacturers to supply repair manuals and spare parts, and by amending the *Copyright Act* to allow for the repair of digital devices and systems."<sup>74</sup> Finally, targeting specifically home appliances, the Prime Minister requested that the Finance Minister "introduce a 15 per cent tax credit of up to \$500 to cover the cost of repairs performed by technicians."<sup>75</sup>

Ministerial mandate letters are far from binding commitments on the part of the government, and commentators have lamented their use by the Prime Minister as more of a shallow public relations exercise than clear policy-setting.<sup>76</sup> Nevertheless, they provide a window into the government's legislative priorities. The 2021 mandate letters reveal a consistent emphasis across multiple ministries on right to repair reforms. They suggest that some

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73. Letter from Justin Trudeau, Off. Prime Minister Can., Minister of Environment and Climate Change Mandate Letter, (Dec. 16, 2021), <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-environment-and-climate-change-mandate-letter/> [hereinafter Environment Mandate Letter]; Letter from Justin Trudeau, Off. Prime Minister Can., , Minister of Innovation, Science and Industry Letter, (Dec. 16, 2021), <https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter/>; Letter from Justin Trudeau, Off. Prime Minister Can., Deputy Prime Minister and Minister of Finance Mandate Letter, (Dec. 16, 2021), <https://pm.gc.ca/en/mandate-letters/2021/12/16/deputy-prime-minister-and-minister-finance-mandate-letter/>.

74. Environment Mandate Letter.

75. Environment Mandate Letter.

76. Eugene Lang, *Ministerial mandate letters: Another nail in the coffin of cabinet government*, POLY OPTIONS (Feb. 15, 2022), <https://policyoptions.irpp.org/magazines/february-2022/ministerial-mandate-letters-another-nail-in-the-coffin-of-cabinet-government/>



of the policies being considered include adjustments to intellectual property laws, amendments to Canada's competition laws, and the creation of a federal sustainability or repairability index. Though there are many ways to implement these goals through legislative reform, the following Part III canvasses a few potential paths forward in these areas.

### III. OPPORTUNITIES FOR FUTURE REFORMS

#### A. INTELLECTUAL PROPERTY LAWS

##### 1. *The Copyright Act's TPM Provisions*

Though Bill C-244, proposing a new TPM Repair Exception, implements a repair-specific exception to permit TPM circumvention, the *Copyright Act* as currently enacted provides an alternative route that may have some advantages. As opposed to legislating exceptions for specific purposes, section 41.21(1) of the *Act* empowers the government to establish regulations, which can exclude certain TPMs or classes of them from protection.<sup>77</sup> Such regulations may be created where the effect of TPMs in certain products or devices is to “unduly restrict competition in the aftermarket sector.”<sup>78</sup> Beyond impacts on secondary markets, section 41.21(2) also permits the creation of regulations excluding TPMs from protection based on “any other relevant factor.”<sup>79</sup> Though repair impediments invoked by TPMs do not always manifest as competitive restraints in aftermarkets, restrictions on repair as a non-infringing use with strong public benefits would very likely be considered “relevant factors.”

Taken together, enacting regulations under section 41.21 could provide a much more responsive and adaptable approach to TPM policy than enacting targeted exceptions allowing circumvention for enumerated purposes. In theory, section 41.21 could be relied upon to establish a regulatory body, which periodically reviews and classifies TPMs in various products and devices. In some ways, this would bring Canada's TPM framework more in line with the periodic exemptions and Librarian of Congress review process in the United States. This regulatory body could assess the extent to which TPMs negatively impact repair activities and otherwise undermine non-infringing uses. Rather than merely permitting circumvention of TPMs for repair purposes, a regulatory body under section 41.21 could exclude certain classes of TPMs from protection altogether. The effect would be to place less weight on whether an activity falls within “diagnosis, maintenance, or repair” and instead

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77. Copyright Act, R.S.C. 1985, c C-42, § 41.21(1) (Can.).

78. Copyright Act, R.S.C. 1985, c C-42, § 41.21(1) (Can.).

79. Copyright Act, R.S.C. 1985, c C-42, § 41.21(2)(vi).

on the role played by the TPM in protecting access to works or device functionality.<sup>80</sup>

Though “any other relevant factor” suggests broad latitude to refuse protection for whole classes of TPMs, the Canada-United States-Mexico free trade agreement (CUSMA) imposes some restraints here. In particular, Article 20.66(4)(h) allows additional exceptions or limitations permitting circumvention of TPMs only where “an actual or likely adverse impact on those non-infringing uses is demonstrated by substantial evidence in a legislative, regulatory, or administrative proceeding in accordance with the Party’s law.”<sup>81</sup> This requirement, however, could be overcome relatively easily by tasking the regulatory body with hearing evidence in relation to the adverse impacts of TPMs.

However, Article 20.66(5) of CUSMA might provide more difficulty for a regulatory body tasked with assessing TPMs. This provision requires that any new exceptions or limitations to anti-circumvention laws must not “impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures.”<sup>82</sup> Neither CUSMA nor Canada’s *Copyright Act* provides guidance on how to proportionately measure the “adequacy of legal protection or the effectiveness of legal remedies” in relation to TPM exceptions. This requirement may mean that, where TPMs inadvertently hinder repair but also “effectively protect access” to onboard software, a purpose-specific TPM exception may be the only option available. This is because excluding these TPMs from protection altogether might impair the “adequacy of legal protection.” Therefore, a regulatory body created under section 41.21 would have to take care to ensure that any exceptions or decisions to exclude certain TPMs from protection altogether would be consistent with Canada’s obligations under CUSMA.

Though undoubtedly requiring technical expertise and resources, a regulatory body overseeing TPM implementations could have several advantages. For one, it could more responsively address situations where TPMs in products and devices only function to inhibit repair or other activities that are in the public interest. A TPM regulatory body could also provide a

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80. The importance of identifying and classifying types of TPMs (or classes of them) was also identified by Canadian Competition Bureau in its submission to Industry, Science and Economic Development Canada. See COMPETITION BUREAU SUBMISSION TO THE CONSULTATION ON A MODERN COPYRIGHT FRAMEWORK FOR ARTIFICIAL INTELLIGENCE AND THE INTERNET OF THINGS, COMPETITION BUREAU CAN. (Sept. 28, 2021), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04602.html#sec03-1/>.

81. United States-Mexico-Canada Agreement art. 20.66(4)(h), Nov. 30, 2018, 134 Stat. 11 (entered into force July 1, 2020).

82. *Id.* at art. 20.66(5).

platform for empirical research regarding industry practices and the relationship between TPM restrictions and consumer expectations.<sup>83</sup> This would have the potential to generate knowledge and refine expertise regarding the appropriate purpose, scope, and configuration of TPMs and the types of restrictions they create in various products. This could address the longstanding need to better understand the breadth of manufacturing and design techniques, which fall within the ambit of anti-circumvention law and the public interest impacts.

## 2. *The Trademarks Act's Counterfeit Products Provisions*

Trademark protections have been occasionally invoked by manufacturers after attaching tiny and barely visible trademarks on replacement parts.<sup>84</sup> This allows manufacturers to control importation and distribution under the auspices of preventing the distribution of counterfeit goods.<sup>85</sup> In one well-cited instance, Henrik Huseby, an independent electronics repairer in Norway, was successfully sued by Apple for importing iPhone compatible replacement screens with allegedly counterfeit Apple logos.<sup>86</sup> The trademarks at issue were tiny logos painted with black ink placed on sections of the screen assembly, which would not be seen by the user once installed into the phone. Nevertheless, the importation and distribution of replacement parts bearing Apple's nearly imperceptible trademark was enough to run afoul of the counterfeit goods provisions under Norway's trademark laws.

While there are no reported instances of manufacturers engaging in similar tactics in Canada, the *Trademarks Act* currently provides all the tools to do so. The relevant provisions were incorporated into the *Trademarks Act* as the result of the 2014 *Combating Counterfeit Products Act*.<sup>87</sup> Not only do these provisions make it unlawful to import goods or packaging bearing trademarks without the manufacturer's consent,<sup>88</sup> but they also provide trademark owners with

83. Precisely this type of study was called for by Pamela Samuelson and Jason Schultz in a 2007 article. See Samuelson & Shultz, *supra* note 56, at 70.

84. Jason Koebler, *DHS Seizes Aftermarket iPhone Screens From Prominent Right-to-Repair Advocate*, VICE, (May 11, 2018, 1:26 PM), <https://www.vice.com/en/article/evk4wk/dhs-seizes-iphone-screens-jessa-jones/>.

85. See Chloé Mikolajczak, *Apple crushes one-man repair shop in Norway's Supreme Court, after three-year battle*, REPAIR.EU, (June 4, 2020), <https://repair.eu/news/apple-crushes-one-man-repair-shop/>; see also PERZANOWSKI, *supra* note 2, at 158–59.

86. Maja van der Velden, *Apple uses trademark law to strengthen its monopoly on repair*, UNIV. OSLO FAC. L. (July 3, 2020, 7:00 AM), <https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/companies-markets-and-sustainability/velden--apple-uses-trademark-law.html>.

87. S.C. 2014, c 32 (Can.).

88. Trademarks Act, R.S.C. 1985, c. T-13, § 51.03(1) (Can.).

assistance from the Canada Border Services Agency (CBSA). Under the “Request for Assistance” provisions of the *Act*, the CBSA may conduct investigations, provide samples of the goods to the trademark owner for inspection, and detain allegedly infringing imported goods.<sup>89</sup> Registered trademark owners can file a simple form to initiate investigation and enforcement.<sup>90</sup> And running afoul of the counterfeit products provisions can result in hefty fines or even imprisonment.<sup>91</sup>

Counterfeit goods provisions serve an important role in preventing unfair competition and misleading consumers. But manufacturers should not be able to rely on them to in turn suppress competition and restrict consumer choice by inhibiting independent repair. For this reason, Canada should consider including an exception to the general prohibition on the importation of trademarked products as part of its right to repair mandate. For purely illustrative purposes, the wording of a replacement parts exception could take shape around addressing products which are:

component parts necessary for the normal use of a complex product and when incorporated into the complex product, the goods, labels, or packaging which bear the registered mark are not perceptible during its normal use and operation.

Including an allowance for products of this nature would build upon the existing “personal use” exception. That provision allows for the import and export of counterfeit goods when intended only for personal use. Similarly, a replacement parts exception would facilitate the import and export of products inadvertently bearing registered marks, which are unlikely to result in brand depreciation or mislead consumers. This would further Canadian trademark law’s objective of preventing confusion in the marketplace while safeguarding against unfair competition.

#### B. SPECIAL REMEDY UNDER THE *COMPETITION ACT*

Many of the techniques used by manufacturers to restrict repair are also impediments to market competition. And the market for repair is not merely a handful of cottage industries, it forms a substantial part of Canada’s economy. In 2020 alone, the Canadian automotive repair and maintenance industry earned \$20.1 billion, while the precision equipment and industrial

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89. *Id.* § 51.04(1).

90. BSF738 – REQUEST FOR ASSISTANCE, CAN. BORDER SERVS. AGENCY (Sept. 21, 2017), <https://www.cbsa-asfc.gc.ca/publications/forms-formulaires/bsf738-eng.html>.

91. Trademarks Act, R.S.C. 1985, c. T-13, §§ 51.03(1), 51.01(6) (Can.).

machinery industries generated \$11.6 billion.<sup>92</sup> If independent repair businesses cannot obtain parts, tools, or information to carry out repairs reliably and safely, then it concentrates both technical knowledge and market power in the hands of only a few manufacturers. For these and other reasons, Canada's right to repair reforms should not only look to recalibrating the scope and exercise of intellectual property rights, but also market competition policy and restrictive trade practices.

Competition law in Canada includes both common law economic torts as well as the statutory rules as set out in the *Competition Act*.<sup>93</sup> The *Act* is administered by the Competition Bureau, and disputes are either heard by either the Competition Tribunal, a special administrative body, or Canada's Federal Court.<sup>94</sup> Though repair restrictions have never been assessed under Canada's *Competition Act* as anti-competitive conduct, the *Act* may nevertheless offer an important legislative platform to enable and bolster the right to repair.

The *Act* includes a whole host of provisions which may curtail anti-competitive practices inhibiting repair.<sup>95</sup> An exhaustive survey of these provisions is beyond the scope of this Article, but one provision that could prove useful is the "special remedy" as set out at § 32.<sup>96</sup> It empowers the Federal Court to order compulsory licensing, declare void, or restrain the exercise of intellectual property rights where they are used to unduly restrain trade or weaken competition.<sup>97</sup> With its ability to tailor the exercise of IP rights, section 32 is novel. Though the *Act* makes clear that any orders issued under section 32 must remain compliant with Canada's international treaty obligations,<sup>98</sup> it is one of the few instances where competition law can have a direct bearing on the exercise of IP rights.<sup>99</sup> And though certainly manufacturers can restrict repair in ways that have little to do with intellectual

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92. *Repair and maintenance services subsector, 2020*, STAT. CAN. (Jan. 11, 2022), <https://www150.statcan.gc.ca/n1/daily-quotidien/220111/dq220111b-eng.htm>.

93. Competition Act, R.S.C. 1985, c C-34 (Can.) [hereinafter Competition Act].

94. *Id.* § 36(3) (describing jurisdiction of federal court); *see also* Competition Tribunal Act, R.S.C. 1985, c 19 (2nd supp), § 3(1) (Can.) (creating the tribunal).

95. *See* Competition Act §§ 75 (refusal to deal), 78 (abuse of dominant position).

96. Competition Act § 32.

97. Competition Act § 32(1).

98. Competition Act § 32(1).

99. In stark contrast to § 32, the Competition Act clarifies at § 79(5) that in the case of abuse of a dominant position, "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trademarks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act."

property rights,<sup>100</sup> many of the common tactics rely on the exclusive rights guaranteed by IP.<sup>101</sup>

As currently enacted, however, section 32 contains procedural limitations that limit its efficacy for enabling the right to repair. Namely, it empowers the Federal Court to make such an order only on “an information exhibited by the Attorney General of Canada.”<sup>102</sup> For example, this means that independent repairers, businesses, or trade associations cannot rely on section 32 as the basis for a private claim. Instead, the utility of the provision relies entirely on the Competition Bureau’s assessment of how IP rights are being wielded by manufacturers.

In its *Intellectual Property Enforcement Guidelines*, the Competition Bureau further clarifies that it will only make such a recommendation where “no appropriate remedy is available under the relevant IP statute,” and only if “the alleged competitive harm stems directly from the refusal and nothing else.”<sup>103</sup> In practice, the Competition Bureau has made clear that it will only refer a matter to the Attorney General under section 32 in “very rare circumstances.”<sup>104</sup>

As part of its commitment to the right to repair, Canada could consider expanding the application of section 32 to enable any interested person to commence a proceeding in Federal Court. This would greatly expand the utility of section 32 by removing the bottleneck created by the Bureau’s need to refer matters to the Attorney General. It would also be consistent with recent reforms to the *Act*, which have introduced a private right of application for “a person granted leave” to allege that they have been harmed by an abuse of dominance.<sup>105</sup> By broadening access to section 32 in the same way, the *Act* would better address instances where abuses of dominance are carried out through the exercise of intellectual property rights.

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100. For example, through the use of warranties which prevent independent repair and servicing. See Whitson Gordon, *The Most Common Ways Manufacturers Prevent You From Repairing Your Devices*, iFIXIT.COM, (Apr. 17, 2019), <https://www.ifixit.com/News/15617/the-most-common-ways-manufacturers-prevent-you-from-repairing-your-devices/>.

101. See PERZANOWSKI, *supra* note 2, at 110–66.

102. Competition Act § 32(2).

103. INTELLECTUAL PROPERTY ENFORCEMENT GUIDELINES, COMPETITION BUREAU CAN. (Mar. 13, 2019), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04421.html#sec07>.

104. *Id.* at 6(3).

105. An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures 2022, HC Bill [C-19] § 262(1) (Can.), <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-19/first-reading>.

Expanding access to section 32 would further modernize Canadian competition law and help it better respond to repair restrictions as well as digital marketplaces.<sup>106</sup> Canada's Competition Bureau has also shown a strong interest in enabling the right to repair recently.<sup>107</sup> Though the preponderance of its attention has been focused on expanding exceptions and limitations to anti-circumvention laws, a less "special" section 32 remedy could delegate some of the responsibility for policing and enforcing abusive uses of IP rights.

As some scholars have pointed out, a delegation of this sort is desperately needed.<sup>108</sup> It would be unrealistic to rely on the Competition Bureau to police all anti-competitive uses of IP rights single-handedly. After all, the Bureau received its first budget increase in 2021 after over a decade of fiscal neglect,<sup>109</sup> and Canada shows a poor track record in resolving competition disputes expediently and efficiently. The last dispute involving allegations of anti-competitive conduct through the exercise of IP took the better part of a decade to conclude, leaving several key questions unanswered.<sup>110</sup>

Admittedly, expanding the application of section 32 is far cry from the comprehensive scrutiny and overhaul that the *Competition Act* deserves. And even if the application of section 32 were expanded, its remedies would not necessarily be a walk in the park for claimants to receive.<sup>111</sup> Claimants would still need to demonstrate that suitable alternatives are unavailable under the

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106. Canada's Standing Committee on Industry, Science and Technology has pointed to the necessity for a review and overhaul of the Competition Act. See *Competitiveness in Canada*, STANDING COMM. ON INDUS., SCI. & TECH. (2021), <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11192572>.

107. In response to Industry, Science and Economic Development Canada's *Consultation on a Modern Framework for Artificial Intelligence and the Internet of Things*, the Competition Bureau advocated strongly for additional TPM exceptions for the purposes of repair and interoperability in order to reduce consumer costs and increase market competition and innovation. See COMPETITION BUREAU SUBMISSION TO THE CONSULTATION ON A MODERN COPYRIGHT FRAMEWORK FOR ARTIFICIAL INTELLIGENCE AND THE INTERNET OF THINGS, COMPETITION BUREAU CAN. (Sept. 28, 2021), <https://strategis.ic.gc.ca/eic/site/cb-bc.nsf/eng/04602.html#sec04>.

108. See Vass Bednar & Robin Shaban, *Canada's Competition Act needs an overhaul*, THE GLOBE & MAIL (June 20, 2021), <https://www.theglobeandmail.com/business/commentary/article-canadas-competition-act-needs-an-overhaul/>.

109. *Id.*

110. *The End of a 7-Year Saga: Supreme Court of Canada refuses leave to appeal in abuse case against Toronto Real Estate Board*, MCCARTHY TETRAULT (Aug. 24, 2018), <https://www.mccarthy.ca/en/insights/articles/end-7-year-saga-supreme-court-canada-refuses-leave-appeal-abuse-case-against-toronto-real-estate-board/>.

111. See Yves Faguy, *A new recourse against abuse of dominance*, CBA NAT'L. (May 28, 2022), <https://www.nationalmagazine.ca/en-ca/articles/law/business-corporate/2022/a-new-recourse-against-abuse-of-dominance/>.

relevant IP statute, and that the manufacturer's restrictions on access to repair are enabled *only* through the exercise of IP.

But expanding the application of section 32 could nevertheless serve as an important interim measure to prevent manufacturers from wielding their intellectual property rights purely to restrict access to repair. As the voluntary CASIS agreement and abandonment of Bill C-273 evidences, addressing anti-competitive repair restrictions enabled through IP requires the coordination of both doctrines. An expanded section 32 could serve as a useful mechanism for this coordination and the development of precedent.

### C. A FEDERAL REPAIRABILITY INDEX

In the Prime Minister's mandate letter to the Minister of Environment and Climate Change, the government identified a right to repair-focused commitment to require "businesses to inform Canadians of the environmental impacts of consumer products."<sup>112</sup> One way to realize this commitment in the context of the right to repair would be to incorporate repairability scores into a federal sustainability index. In assessing various products to establish repairability ratings, Canada could draw influence from established repairability indices and scoring systems elsewhere, including France's *L'indice de réparabilité*<sup>113</sup> and iFixit's scoring systems.<sup>114</sup>

The creation of a sustainability index with product repairability scores would not be entirely unprecedented. The *Canadian Environmental Protection Act*<sup>115</sup> (CEPA) already maintains an Environmental Registry of documentation relating to the environmental impacts of various products, as well as codes of practice and regulations.<sup>116</sup> This registry would be a logical place for incorporating a sustainability index with repairability scores into CEPA.

To require that manufacturers make this information publicly available, however, CEPA would have to be further amended to include section mandating disclosure in relation to a specific range of products or devices. Setting the scope here is important. Much like the European Union's *EcoDesign Directive*<sup>117</sup> and France's repairability index, Canada should identify a selection

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112. Environment Mandate Letter.

113. *Repairability Index*, *supra* note 47.

114. iFixit, *Laptop Repairability Scores* (last visited May 15, 2022), *Laptop Repairability Scores*, iFixit, <https://www.ifixit.com/laptop-repairability/> (last visited May 15, 2022).

115. Canadian Environmental Protection Act, S.C. 1999, c 33, § 12 (Can.).

116. *Canadian Environmental Protection Act Registry*, GOV'T CAN., <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry.html/>.

117. *The new ecodesign measures explained*, EUR. COMM'N (Oct. 1, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_19\\_5889/](https://ec.europa.eu/commission/presscorner/detail/en/qanda_19_5889/).



of key product categories that would form part of its initial scoring system. One key category in this regard is products likely to contribute to e-waste, a pressing issue for which there is currently no federal policy or regulation. Given the growing volume of electronics waste in Canada,<sup>118</sup> implementing repairability scores for electronic devices could be an effective starting point for a sustainability index.

Enabling the right to repair requires more than curtailing the anti-competitive use of intellectual property rights or ensuring access to tools and information. It also requires arming consumers with the information they need to make informed decisions about the sustainability and repairability of products. To ensure consistency and uniformity in repairability scoring and consumer protection, Canada's federal government should take a leadership role devising such an index within CEPA's current framework.

#### IV. OBSTACLES & CHALLENGES

Even though the right to repair has been identified as a key policy priority by Canada's federal government, there may be some impediments to fully achieving the goals stated in the ministerial mandate letters. For one, Canada's constitution restricts the scope of federal legislative authority to certain subjects. Any federal reforms enacted in pursuit of the right to repair must be careful not to encroach on the exclusive legislative jurisdiction of the provinces. Secondly, Canada must ensure that the right to repair under Canadian law is not merely an extraneous or transplanted set of norms established elsewhere. In other words, the right to repair movement in Canada and its policy reforms should reflect the idiosyncrasies of the Canadian political and cultural landscape. These caveats and potential obstacles are briefly discussed below.

##### A. THE LIMITS OF FEDERAL LEGISLATIVE AUTHORITY

In legislating the right to repair, Canada's federal government is subject to some constitutional constraints. Canada's *Constitution Act, 1867* sets the distribution of federal and provincial legislative powers at sections 91 and 92, respectively.<sup>119</sup> For the most part, Canada's preeminent intellectual property

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118. Gordon Dewis & Peter Van Wesenbeeck, *Trash talking: Dealing with Canadian household e-waste*, STAT. CAN. (May 24, 2016), <https://www150.statcan.gc.ca/n1/pub/16-002-x/2016001/article/14570-eng.html/>.

119. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.) [hereinafter Constitution Act].

statutes are enacted under one of three heads of federal power.<sup>120</sup> “Copyrights”<sup>121</sup> and “patents of invention and discovery”<sup>122</sup> are clearly enumerated, whereas the jurisdiction for the federal parliament to legislate in respect of trademarks has been generally asserted<sup>123</sup> as falling under “The Regulation of Trade and Commerce.”<sup>124</sup> Canada’s *Competition Act* is another legislative scheme that is enacted under section 91’s “trade and commerce” power.<sup>125</sup>

In legislating right to repair reforms, Canada’s parliament would need to ensure that proposed legislation falls within a federal head of power. In the case of enacting TPM regulations under section 41.21 of the *Copyright Act*, constitutionality may be less of a concern. In that scenario, Parliament would be merely creating regulations under an existing provision of the *Act* that may only have incidental effects outside of copyright regulation. The situation would be different, however, in the case of creating a federal sustainability index with product repairability scores. So too would it be different for amending the *Competition Act* to broaden access to section 32’s “special remedy” to safeguard against the monopolization of repair. In those instances, Parliament would likely need to demonstrate that the proposed legislation falls within its general “trade and commerce” power.

The Supreme Court of Canada set down a five-part test for determining whether proposed legislation falls within the trade and commerce power in *General Motors of Canada Ltd. v City National Leasing*.<sup>126</sup> The proposed act or amendment must be: (1) part of a general regulatory scheme; (2) monitored by the continuing oversight of a regulatory agency; (3) concerned with trade as a whole rather than with a particular industry; (4) a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) jeopardized by the failure to include one or more provinces or localities in a legislative scheme.<sup>127</sup>

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120. Jeremy F. de Beer, *Copyrights, Federalism, and the Constitutionality of Canada’s Private Copying Levy* 51 MCGILL L. J. 735 (2006), 739–740.

121. Constitution Act § 91(23).

122. Constitution Act § 91(22).

123. See *Kirkbi AG v. Rivtik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302 (Can.); *MacDonald v. Vapour Canada Ltd.*, [1977] 2 S.C.R. 134, 166 (Can.).

124. Constitution Act § 91(2). However, there has been some scholarly debate on the extent to which some provisions of the Trademarks Act fall within this head of power. See, e.g., Tony Bortolin, *Constitutionality of Canadian Trademark Legislation Revisited*, 36 CAN. INTELL. PROP. REV. 6 (2021).

125. Competition Act.

126. (1989), 1 S.C.R. 641, 668 (Can.).

127. *Id.*

Whether Parliament can meet the *General Motors* test would depend on its overall approach to a general right to repair regulatory scheme. If the scheme contained itself to regulating the anti-competitive exercise of intellectual property rights in ways that inhibit repair across all industries, it would stand a better chance of meeting the *General Motors* test. Such a scheme could feasibly be monitored by the Competition Bureau, and its focus on the exercise of intellectual property rights would satisfy the fourth and fifth branches of the test. On the other hand, if Parliament enacted a regulatory scheme which sought also to regulate other impediments to repair (e.g., warranty terms and consumer contracts), then Parliament may find itself encroaching on provincial jurisdiction.

The result is that Parliament must be careful in setting the width of the net it casts in pursuit of right to repair legislation. In creating a federal sustainability index with repairability scores, Parliament must also consider an analogous system being proposed as part of Quebec's Bill 197.<sup>128</sup> Should Quebec push ahead with creating this index, it may become more difficult for Parliament to later legislate in the area given the fourth and fifth branches of the *General Motors* test. Overall, these caveats and limitations in the exercise of federal legislative power point strongly to the need for strong federal-provincial cooperation moving forward.

#### B. THE NEED FOR A GRASSROOTS RIGHT TO REPAIR RATIONALE

As a global movement touching upon many industries, livelihoods, and communities, the right to repair can be justified on many grounds. Advocates in the United States have generally followed a rationale of consumer protection, reduced costs, and increasing consumer choice.<sup>129</sup> The European Union, on the other hand, has generally followed a circular economy, sustainability, and waste reduction rationale.<sup>130</sup>

Looking at even a superficial level, the distinction between these two rationales is palpable. The organizational structure and mission statements evoked by advocacy groups in the United States and Europe reveals much about their rationales for reform. Repair.org, for example, is a trade association

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128. Bill 197, § 12.

129. See *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*, FED. TRADE COMM'N 38–40 (May 2021), [https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing\\_the\\_fix\\_report\\_final\\_5521\\_630pm-508\\_002.pdf](https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf).

130. See, e.g., *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A new Circular Economy Action Plan*, EUR. COMM'N COM 98 final (Mar. 11, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:98:FIN>.

representing businesses that offers varying levels of membership and access. Its mission statement strongly emphasizes consumer rights and personal property ownership with, “You bought it, you should own it. Period,” and “You should have the right to use it, modify it, and repair it whenever, wherever, and however you want.”<sup>131</sup> The emphasis, therefore, is largely on the individual consumer and negative liberties.

The EU’s Repair.eu, on the other hand, looks to resolving impediments to repair somewhat differently. Coining itself as a group of “sustainability activists,” Repair.eu is governed by a steering group of mostly environmental NGOs and citizens organizations. Its focus is oriented toward extending product lifespan and reducing electronics waste through a more interventionist approach. “We’re fighting to remove the barriers to repair our products, so they can last longer,” their mission statement reads.<sup>132</sup> The environmental rationale also informs Repair.eu’s advocacy approach, which generally evidences much more attention on enacting new regulations to govern product design and informing consumers about end-of-life impacts.<sup>133</sup> Indeed, the European Union’s *EcoDesign Directive* is consistent with this rationale.<sup>134</sup>

Though both approaches are compelling in their own right, there remains a need for the right to repair to find its own *raison d’être* in Canada. In some respects, the distinct rationales for the right to repair in the United States and Europe reflect differences in their social and cultural values as well as legal traditions. Similarly, the right to repair in Canada needs to find resonance with Canadians in the context of the country’s unique sociopolitical landscape and cultural identity.

One aspect of repair that may strike such a chord is its potential to empower rural and remote communities. Though 88% of Canadians live in urban centers, the remaining 12% of its population is spread across three quarters of the country’s vast and often remote landmass.<sup>135</sup> When people live far away from urban centers manufacturers are based, this can make self and independent repair a necessity for survival. As many farmers have come to understand, relying on dealer-certified technicians to have their machinery

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131. *About us*, REPAIR.ORG, <https://www.repair.org/aboutus/> (last visited Feb. 17, 2022).

132. *Who we are*, REPAIR.EU, <https://repair.eu/about/> (last visited Feb. 17, 2022).

133. See, e.g., Marie Castelli, BackMarket & Orla Butler, *Trilogues: our continued push for strong battery regulations*, REPAIR.EU (May 17, 2022), <https://repair.eu/news/trilogues-our-continued-push-for-strong-battery-regulations/>.

134. Dewis & Van Wesenbeeck, *supra* note 118.

135. *Population growth in Canada’s rural areas, 2016 to 2021*, STAT. CAN. (Feb. 9, 2022), <https://www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-x/2021002/98-200-x2021002-eng.cfm/>.

repaired can result in significant delays and costs.<sup>136</sup> Therefore, the normative basis for Canada's right to repair should include the importance of repair to the country's rural and remote communities.

Decentralizing repair also decentralizes technical knowledge and expertise. Ethnographic studies have found that when repair is something that can be shared and taught, it can also strengthen bonds between people and their communities.<sup>137</sup> In the case of Canada's rural indigenous communities in particular, repair can serve as a conduit for community empowerment, while taking control and shaping the use of ICTs in furtherance of self-determination. To some degree, the right to repair for Canada's rural indigenous communities can enable the development of so-called "digital self-determination" through the sustainability and maintenance of community-based media, networking, and development projects.<sup>138</sup>

Showing some promise here, the importance of repair for Canada's rural communities has not been lost on policymakers. When MP Brian Masse campaigned for his most recent automotive right to repair bill, he made sure to visit rural communities located far away from dealerships, noting that the bill would prevent Canadians from having to travel "hundreds of kilometers in rural communities...to get to the manufacturer's authorized dealer."<sup>139</sup> Right to repair advocates and policymakers in Canada should not lose sight of these social dynamics of access to repair. In addition to the benefits for market competition, consumer choice, and reducing environmental waste, the rationale for the right to repair in Canada must be in tune with the urban and rural dynamics that shape much of Canada's society and politics.

## V. CONCLUSION

The foregoing hits on two general themes. For one, there is ample appetite among Canadian policymakers to pursue right to repair reforms. Apart from Ontario's Bill 72, proposed right to repair bills have generally found multi-

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136. *Population growth in Canada's rural areas, 2016 to 2021* STAT. CAN. (Feb. 9, 2022), <https://www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-x/2021002/98-200-x2021002-eng.cfm>.

137. Syed Ishtiaque Ahmed, Steven J. Jackson & Rashidujjaman Rifat, *Learning to Fix: Knowledge, Collaboration and Mobile Phone Repair in Dhaka, Bangladesh*, ICTD '15 (May 15-18, 2015, Singapore), <https://dl.acm.org/doi/10.1145/2737856.2738018/>.

138. Rob McMahon, *Digital Self-Determination: Aboriginal Peoples and the Network Society in Canada* 16–21 (May 31, 2013) (Ph.D. dissertation, Simon Fraser University), <http://summit.sfu.ca/item/13532/>.

139. Chris Thompson, *Masse reintroduces bill to provide motorists more car repair freedom*, WINDSOR STAR (Feb. 4, 2022), <https://windsorstar.com/news/local-news/masse-reintroduces-bill-to-provide-motorists-more-car-repair-freedom/>.

partisan support across every region of the country. Canada's federal government has also signaled that pursuing right to repair reforms are a key part of its strategy moving forward.

On the other hand, realizing Canada's commitments toward the right to repair requires a more unified strategy than what has devised to date. Unlocking the right to repair requires navigating the limits of federal and provincial jurisdiction to tackle the interwoven nature of competition policy, consumer protection, and intellectual property rights. Disharmony and inconsistency between federal and provincial repair legislation in these areas risks creating the inefficiencies and harms to consumer choice cynically threatened by manufacturers and industry groups. To effectively coordinate efforts toward the right to repair, a greater degree of federal-provincial cooperation will almost certainly be needed.

As for potential federal reforms, Parliament is left with many more tools at its disposal than what has been proposed through private members' bills to date. This includes enacting regulations under the *Copyright Act* to better address the anti-competitive uses of TPMs, facilitating the importation of replacement parts, and establishing a sustainability index with repairability scoring under the auspices of environmental protection.

Beyond the reforms addressed in this Article, there are many other reforms that could and should be considered. One example is a new framework of exceptions under Canada's *Industrial Design Act*<sup>140</sup> to permit manufacturing of replacement parts that perform both an aesthetic and utilitarian function. Before such a framework can be articulated, however, further research is needed on the relationship between Canadian industrial design rights and their practical impacts on repairability. Another avenue for reforms exists at the municipal level, where cities retain an enormous potential to address efficiency standards and the end-of-life impacts of products. A recently approved bylaw in the District of North Vancouver requiring reclamation of lumber from home demolitions is one such example.<sup>141</sup> But in all cases, it is crucial that

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140. Industrial Design Act, R.S.C. 1985, c I-9 (Can.).

141. Rafferty Baker, *New bylaw aims to save wood from the landfill during home demolitions in North Vancouver*, CBC NEWS (June 18, 2022), <https://www.cbc.ca/news/canada/british-columbia/north-vancouver-wood-salvage-demolition-bylaw-1.6493461>; see also *Agenda – Regular Meeting of Council*, District Council, 61–90 (District of North Vancouver, B.C., June 13, 2022), <https://app.dnv.org/councilsearchnew/> (outlining the “Proposed Demolition Waste Reduction Bylaw”)(enter “06/13/2022” as beginning and end dates in date fields in “Full Search” panel, with “Meeting type” value set to “All Meetings” and “Topic” value set to “Select topic” [unchanged]; click “Search” button; when new page loads, go to list of links for “Regular Meeting” under “Past Meetings” heading; click “Agenda with reports” to download PDF of Agenda).

policymakers proposing reforms pay close attention to the limitations of legislative jurisdiction within Canada's federal system. The benefits of the right to repair would be lost if Canadians did not make use of it. Repair must not only be shown to be legally permissible, but also feasible and within the capabilities of everyday people. This points to a need to reorient Canada's cultural affinity for repair and self-reliance with today's paradigm of widespread computerization and embedded system design. On this point, Canadian right to repair advocates must stress the importance of repair to rural and remote communities, with a particular focus on Canada's indigenous peoples.